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In the

Supreme Court of the United States.

OCTOBER TERM, 1987

THOMAS ROBERTS AND HAIG ARAKELIAN,
PETITIONERS,

v.

SECRETARY OF LABOR, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Memorandum for the Petitioners.

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REPLY MEMORANDUM FOR THE PETITIONERS

The Brief for the Respondents in Opposition ("Resp. Br.") raises a few new points which require response.

1. The issue in Traynor v. Turnage,[1/] is not solely, as the

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1/ 791 F.2d 226 (2d Cir. 1986), cert. granted __ U.S. ___, 107 Sup. Ct. 1368 (1987)

government seems to claim (Resp. Br. 11-12), whether the agency decision there is reviewable under 38 U.S.C. 211(a) because it arises "under" the Rehabilitation Act of 1973, 29 U.S.C. 794, not "under" a Veterans Administration statute providing benefits for veterans. In fact, the Second Circuit's decision was based on its view that 38 U.S.C. 211(a) bars all judicial review of individual veterans claims. Id., 791 F.2d at 229. Based on this view, the court rejected two arguments to the contrary. It disagreed with the dissent (Id., 791 F.2d at 231-233) that 38 U.S.C. 211(a) permits review of agency decisions arising under a statute not administered by the Veterans Administration, and that the decision there arose under the Rehabilitation

Act. Id. at 791 F.2d 229-230. Apart from that, it rejected the view of other circuits[2/] that 38 U.S.C. 211(a) permits a distinction between the review of appeals from individual claims adjudications and broad challenges to the validity of agency regulations. Id., 791 F.2d at 230-231.[3/] In this Court, the Traynor parties have briefed and argued both points.[4/]

2/ See Petition for Certiorari ("Pet."), pages 42-45.

3/ The government, in its Traynor brief, does not ask this Court to overrule those cases. Rather, it claims they are distinguishable because they involve challenges to Veterans Administration regulations by interested non-claimant third parties which had no opportunity to be heard in administrative proceedings. Traynor v. Turnage, Nos. 86-822 and 86-737, Brief for the Respondents, page 17, n. 8.

4/ The Traynor petitioners primarily advanced the Rehabilitation Act
(footnote continued on next page)

Thus, contrary to the government's claim, the issue whether 38 U.S.C. 211(a) permits a distinction between judicial review of regulations and adjudications is clearly presented in

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argument, but also asserted the regulation/adjudication distinction. Traynor v. Turnage, Nos. 86-622 and 86-737, Brief for Petitioners, pages 37-49. The Traynor amicus curiae asked the Court, no matter what its decision on the Rehabilitation Act issue, to address whether 38 U.S.C. 211(a) permits review of Veterans Administration policies and regulations (Traynor v. Turnage, Nos. 86-622 and 86-737, Brief Amicus Curiae of Vietnam Veterans of America in Support of Petitioners, pages 16-17), asserting that it does (Id., pages 14-24). The government's brief, apparently recognizing that it must prevail on both points, supports the Second Circuit's decision on both issues. Traynor v. Turnage, Nos. 86-32 and 82-737, Brief for the Respondents, pages 12-25. On the regulations/adjudications issue, the government relies on the First Circuit's rejection, in the instant case, of the "identical" argument of petitioners here. Id., Brief for the Respondents, page 22, n. 12.

Traynor. The same legal issue appears in this case with respect to the Federal Employees Compensation Act ("FECA"), 5 U.S.C. 8101, et seq., andthe statutes are undoubtedly similar.[5/] Therefore, a decision by this Court in favor or the petitioners in Traynor on the regulations/adjudications issue would seriously call into doubt the decision of the Court of Appeals in this case.

5/ The facts of the instant case differ from those in Traynor, however. Here, unlike in Traynor, the challenge to agency regulations and policies did not arise during a claims adjudication. Instead, the FECA Memorandum at issue was issued and applied without an opportunity for affected claimants to be heard in administrative proceedings. See Pet. 8-10. Thus, even though claimants are involved, the instant case would seem to fall within the area where review is proper according to the distinction drawn by the government in its Traynor brief. See n.3, supra.

2. FECA's judicial review preclusion provision (5 U.S.C. 8128(b)), contrary to the government's claim (Resp. Br. 12), has language which may permit review of a decision of the Secretary arising "under" a statute other than FECA. Section 8128(b) makes final "[t]he action of the Secretary . . . in allowing or denying a payment under this subchapter . . . ." [emphasis added] Thus, §8128(b), like 38 U.S.C. 211(a), permits a reading which does not preclude judicial review where the Secretary of Labor interprets the meaning of statutes other than FECA.

Nor was the government correct to assert (Resp. Br. 12) that it was, in any case, the Secretary's interpretation of FECA which was

dispositive here. The government argued below that it was the National Guard Technicians' Act ("NGTA"), Pub. L. 90-486, 32 U.S.C. 709, which required that National Guard technicians elect between state disability retirement benefits and FECA benefits, as well as asserting that the purpose of FECA, in 5 U.S.C. 8116, would be served by permitting that election requirement. See Pet. App. 40A-41A. Thus, this case arguably arises not under FECA but under the NGTA.[6/]

6/ The district court found absolutely nothing in FECA, and very little in the NGTA, to support the government's position. See Pet. App. 43A-52A. Thus, FECA was only "dispositive" (Resp. Br. 12) here in that it dispositively failed to support the Secretary's decision. The Secretary was thus forced to rely solely on his interpretation of the NGTA for support.

3. The legislative history referred to by the government (Resp. Br. 10, n. 7), which well precedes the passage of the present preclusion language in §8128(b), does not conclusively elucidate the meaning of the present statute. The remarks referred to were made prior to the passage, in 1924, of the first review preclusion language in FECA. Act of June 5, 1924, c. 261, §1, 43 Stat. 389. That statute did not make specific reference to the prohibition of judicial review, prohibiting only review "by any other administrative officer, employee or agent of the United States." It was passed to resolve a dispute which had arisen regarding whether the Comptroller General could overrule compensation decisions of the Commissioner of

Compensation (who then had authority over the administration of compensation claims).[7] Thus, Congress was then specifically concerned only with curbing review by other federal agencies, not the courts. See H.R. Rep. 280, 68th Cong., 1st Sess. 2, et seq.; 65 Cong. Rec. H8154-8167 (1924).[8]

7/ The dispute involved whether the compensation statute then in effect permitted the Commissioner to satisfy employee claims resulting from "occupational diseases" rather than injuries.

8/ The few references in the legislative history of the 1924 statute to the lack of judicial review under the statute previously in force appeared to derive from an opinion of the Attorney General issued prior to the passage of the 1924 statute as an attempt to mediate the dispute between the Comptroller General and the Commissioner of Compensation. 33 Op. Atty. Gen. 476 (1923). Since the prior statute (Act of September 7, 1916, c. 458, §37, 39 Stat. 742, 749) contained no preclusion language at all, the

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4. With respect to the case of Dipippa v. United States, 687 F.2d 14 (3rd Cir. 1982) (Resp. Br. 8, n. 5), the government failed to cite Wallace v. United States, 669 F.2d 947 (4th Cir. 1982), where the Fourth Circuit reached a contrary conclusion. It held that the Secretary of Labor's decision in a FECA memorandum (that swine flu vaccinations given on federal premises arose out of federal employment and

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(footnote continued)

Attorney General's reference to a lack of judicial review under that statute is hardly persuasive. Furthermore, while concluding that the decisions of the Commissioner of Compensation were final regarding compensation claims, the Attorney General went on to review at length the Commission's policy conclusion that the compensation statute then in effect intended to compensate for "occupational diseases." 33 Op. Atty. Gen. at 479-485.

that, thus, any resulting injury is covered exclusively by FECA) was not a controlling interpretation of FECA. Wallace, supra, 669 F.2d at 943-954.

For the foregoing reasons, and those contained in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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